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No. 95-1461

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

PETITTE BROTHERS MINING COMPANY, INC., JASPER PETITTE, JOHN PETITTE, JR. and JAMES BARILL,

Petitioners,

vs.

JOSEPH P. CONNORS, SR., DONALD E. PIERCE, JR., WILLIAM MILLER, WILLIAM B. JORDAN and PAUL R. DEAN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONDENTS' BRIEF IN OPPOSITION

DAVID W. ALLEN*
General Counsel
MARGARET M. TOPPS
Deputy General Counsel
LARRY D. NEWSOME
Associate General Counsel
CORINA M. TRAINER
Assistant General Counsel

* *Counsel of Record*

UMWA HEALTH AND RETIREMENT FUNDS
Office of General Counsel
4455 Connecticut Avenue, N.W.
Washington, D.C. 20008
(202) 895-3737

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QUESTION PRESENTED

I. Does a statutory provision, 29 U.S.C. § 1301(b)(1), which imposes joint and several liability upon a partnership under common control with a corporate employer abrogate state corporation law and thus implicate the Tenth Amendment?

II. Does the imposition of withdrawal liability on all entities under common control constitute a compensable taking under the Taking Clause of the Fifth Amendment?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENT	3
ARGUMENT	4
The Tenth Amendment is not implicated in this case because the controlled group provision does not abrogate state corporation law	4
This case raises no new issue under the Taking Clause of the Fifth Amendment	6
CONCLUSION	8

TABLE OF AUTHORITIES

CASES	*Page*
Central States S.E. and S.W. Areas Pension Fund v. Personnel, Inc., 974 F.2d 789 (7th Cir. 1992)	5, 6
Concrete Pipe & Prod. of Calif. v. Construction Laborers Pension Trust for Southern Calif., 113 S. Ct. 2264 (1993)	3, 4, 6
Connolly v. PBGC, 475 U.S. 211 (1986)	3, 4, 6, 7
Connors v. Incoal, Inc., 995 F.2d 245 (D.C. Cir. 1993)	5, 6
Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985)	5
Hodel v. Indiana, 452 U.S. 314 (1981)	5
IUE AFL-CIO Pension Fund v. Barker & Williamson, Inc., 788 F.2d 118 (3d Cir. 1986)	6
PBGC v. R.A. Gray & Co., 467 U.S. 717 (1984)	2, 5
Western Conf. of Teamsters Pension Trust v. H.F. Johnson, 830 F.2d 1009 (9th Cir. 1987)	4, 5, 6
Western Conf. of Teamsters Pension Trust Fund v. Lafrenz, 837 F.2d 892 (9th Cir. 1988)	5, 6

OTHER AUTHORITIES *Page*

U.S. Const. amend. V 2, 3, 4, 6, 7

U.S. Const. amend. X *2, 3, 4, 5, 6*

I.R.C. § 414(c) 4

29 U.S.C. § 1301(b)(1) (1974) *4, 6*

29 U.S.C. §§ 1381-1461 (1980) *2*

29 U.S.C. §§ 1381-1383 (1980) 2

29 C.F.R. § 2612 4

Treas. Reg. 1.414(c)-2 4

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BRIEF OF THE RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

This case arose from a withdrawal liability assessment made by the United Mine Workers of America 1950 Pension Plan and the United Mine Workers of America 1974 Pension Plan (the "Plans") pursuant to Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA") *as amended by* the Multiemployer Pension Plan Amendments Act

of 1980 ("MPPAA"). 29 U.S.C. §§ 1381-1461. The MPPAA requires employers who withdraw from multiemployer pension plans to pay withdrawal liability. 29 U.S.C.§§ 1381-1383.

Withdrawal liability represents the withdrawn employer's proportionate share of the plan's underfunding, and restores the loss to the plan's contribution base caused by the employer's withdrawal. *See generally PBGC v. R.A. Gray & Co.*, 467 U.S. 717, 721-25 (1984). Payment of withdrawal liability helps ensure that plans have sufficient assets to pay the pensions promised, but left unfunded by the withdrawing employers. *Id.* at 725.

Petitte Brothers Mining Co., Inc. ("PBM") was a participating employer in the Plans. (App. C-2).[1] PBM withdrew from the Plans in March 1981. At the time of the withdrawal, M&J Coal Company ("M&J") and Maiden Mining Company ("Maiden"), two partnerships, were under common control with PBM. (App. C-2).

The Plans sued PBM and Jasper Petitte, John Petitte, Jr., and James Barill in their capacity as partners in M&J and Maiden (the "Partners") to collect delinquent withdrawal liability payments. Petitioners raised numerous defenses including claims that the MPPAA, as applied, impermissibly abrogated state corporation law in violation of the Tenth Amendment and effected a taking under the Fifth Amendment.

In 1989, the district court found that "the defendants had not stated any basis for their constitutional argument," but

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[1]References to the Appendix to the Petition, which is bound with the Petition, are denoted "App. ___."

withheld a decision until all other issues in the case were decided. (App. D-4). The district court also found that PBM, M&J and Maiden were under common control and, therefore, jointly and severally liable for PBM's withdrawal liability. Because M&J and Maiden were unincorporated entities, the partners were liable. (App. D-3). In October 1994, the district court held that the imposition of withdrawal liability on the Partners did not violate the Taking Clause of the Fifth Amendment. (App. C-6, C-9 n.4).

In affirming the district court, the United States Court of Appeals for the District of Columbia Circuit held that "because the controlled group provision did not impose liability on appellants as corporate shareholders, there is no conflict with state incorporation law, and the question of preemption does not arise." (App. B-2). Relying on *Concrete Pipe & Prod. of Calif. v. Construction Laborers Pension Trust for Southern Calif.*, 113 S. Ct. 2264, 2289-92 (1993), and *Connolly v. PBGC*, 475 U.S. 211, 221-28 (1986), the court found that Petitioners' taking argument was "foreclosed by binding and unequivocal Supreme Court precedent." (App. B-2).

SUMMARY OF THE ARGUMENT

The petition for writ of certiorari should be denied because this case neither implicates the Tenth Amendment nor raises a new issue under the Taking Clause of the Fifth Amendment. The Tenth Amendment is not implicated because the controlled group provision mandates that corporations and partnerships under common control are treated as a single employer for MPPAA purposes but does not interfere with state law governing personal liability for those entities' obligations. Because the controlled group provision does not abrogate state corporation law, there is no preemption.

This case raises no new issue under the Taking Clause of the Fifth Amendment because the decision below accords with this Court's decisions in *Concrete Pipe* and *Connolly* which held that the application of the MPPAA does not constitute a taking under the Fifth Amendment. Because the application of the controlled group provision does not alter the taking analysis articulated by this Court, this case raises no new issue that requires this Court's intervention.

ARGUMENT

I. The Tenth Amendment is not implicated in this case because the controlled group provision does not abrogate state corporation law.

The court below correctly found no predicate for Petitioners' Tenth Amendment argument. The Partners' liability in this case is based on their status as partners in two unincorporated businesses, under common control[2] with an employer that withdrew from the Plans,[3] not because the controlled group provision mandate shareholder liability in abrogation of state corporation law.

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[2]"Common control" for purposes of 29 U.S.C. § 1301(b)(1) is defined by reference to regulations adopted under Section 414(c) of the Internal Revenue Code. 29 C.F.R. § 2612; Treas. Reg. 1.414(c)-2.

[3]It is a universal principal of states' partnership laws that "[a]bsent any limitation in the partnership agreement, partners are personally liable for obligations of the partnership." *Western Conf. of Teamsters Pension Trust v. H.F. Johnson*, 830 F.2d 1009, 1015 (9th Cir. 1987).

Petitioners concede, as they must, that Congress had authority to enact the controlled group provision.[4] The absence of state law controlled group rules imposing liability on partnerships under similar circumstances does not prevent Congress from exercising its power under the Commerce Clause of the Constitution to establish such rules.[5] It is, therefore, difficult to discern how a Tenth Amendment issue can arise. The personal liability in this case does not flow from this act of Congress but from adherence to the state corporation and partnership laws that Petitioners claim Congress abrogated.

All courts that have considered the controlled group provision have imposed joint and several liability on all members of the controlled group, *e.g.*, *Connors v. Incoal, Inc.*, 995 F.2d 245, 254 (D.C. Cir. 1993); *Central States, S.E. and S.W. Areas Pension Fund v. Personnel, Inc.*, 974 F.2d 789 (7th Cir. 1992); *Western Conf. of Teamsters Pension Trust Fund v. Lafrenz*, 837 F.2d 892 (9th Cir. 1988); *IUE AFL-CIO Pension*

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[4]This Court previously found that MPPAA withdrawal liability does not violate Due Process Clause. *R.A. Gray & Co.*, 467 U.S. at 730-32. The fact that the statute treats all trades or businesses under common control as a single employer does not alter this finding. The controlled group provision reflects a legislative decision that where formally separate business enterprises share a sufficient degree of common ownership, they should be deemed parts of a single economic unit. *See H.F. Johnson*, 830 F.2d 1009, 1013 (9th Cir. 1987).

[5]Because MPPAA does not regulate the States as States or directly regulate an area expressly reserved to the States, but rather regulates private individuals and businesses, the Tenth Amendment is not implicated. *E.g.*, *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 537 (1985); *Hodel v. Indiana*, 452 U.S. 314, 330 (1981).

Fund v. Barker & Williamson, Inc., 788 F.2d 118 (3d Cir. 1986), but the extent of liability on the owners of these businesses has been determined by each owner's choice of organizational form. Operating in an unincorporated business form may subject the participants to personal liability. See e.g., *Incoal.*, 995 F.2d at 254; *Personnel*, 974 F.2d at 793; *Lafrenz*, 837 F.2d at 895; *H.F. Johnson*, 830 F.2d at 1013.

The controlled group provision does not affect the Partners' rights as shareholders; it mandates that M&J and Maiden are jointly and severally liable for PBM's withdrawal liability debt. The Partners' personal liability is the result of their choice to operate M&J and Maiden in an unincorporated form. Since the controlled group provision does not affect state corporation law, the court below correctly determined that there is no preemption. Accordingly, there is no Tenth Amendment violation.

II. This case raises no new issue under the Taking Clause of the Fifth Amendment.

In *Concrete Pipe* and *Connolly*, this Court held that the payment of MPPAA required withdrawal liability does not constitute a compensable taking. *Concrete Pipe*, 113 S. Ct. 2264 (1993); *Connolly*, 475 U.S. 211 (1986). The application of the controlled group provision of 29 U.S.C. § 1301(b)(1) does not alter the taking analysis articulated by this Court.

In *Connolly*, this Court identified three factors to be considered in an analysis of whether the MPPAA withdrawal liability provisions impermissibly take the employer's property under the taking clause of the Fifth Amendment: "(1) the economic impact of the regulation; (2) the extent to which the regulation has interfered with distinct investment-backed

expectations; and (3) the character of the governmental action." *Connolly*, 475 U.S. at 225.

First, since there is a relationship between the employer and the plan, "the mere fact that the employer must pay money to comply with the Act is but a necessary consequence of the MPPAA's regulatory scheme." *Id.* Second, since pension plans were "the object of legislative concern long before the passage of ERISA," prudent employers had notice that withdrawal itself might trigger financial obligations. *Id.* at 226. Third, the government does not "appropriate any of the employer's assets for its own use. Instead, the Act . . . requir[es] a withdrawing employer to fund its share of the plan obligations incurred during its association with the plan." *Id.*

Based on the record of this case, there is no basis to believe that the district court failed to apply the *Connolly* factors properly. Accordingly, this case raises no new issue under the Taking Clause of the Fifth Amendment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

David W. Allen*
General Counsel

Margaret M. Topps
Deputy General Counsel

Larry D. Newsome
Associate General Counsel

Corina M. Trainer
Assistant General Counsel

UMWA HEALTH AND RETIREMENT FUNDS
Office of General Counsel
4455 Connecticut Ave., N.W.
Washington, D.C. 20008
(202) 895-3737

*Counsel of Record

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